# In The
# Supreme Court Of The United States

OCTOBER TERM, 1978

NO. 78-714

CLARENCE WELCH, Administrator of the Estate of DAVID R. WELCH, Petitioner

V.

W. GRAHAM CLAYTOR, JR., the Secretary of the Navy, Respondent

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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## CITATIONS

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SUPREME COURT OF THE UNITED STATES

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The Petitioner, Clarence Welch, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on June 20, 1978.

## OPINION BELOW

The Court of Appeals did not render a separate opinion in affirming the judgment of the U.S. District Court for the District of Connecticut, but the reasons given for the affirmance appear in the Appendix hereto. The opinion rendered by the District Court is reported at 446 F.Supp. 75.

## JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was entered June 20, 1978. A timely Application for Extension of Time in Which to File Petition for Writ of Certiorari was granted by Mr. Justice Powell on September 8, 1978, to and including October 19, 1978. This Petition was filed within the alloted extension of time. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

## QUESTIONS PRESENTED

1. Are subsequent constructions of the "incident to service" exception of the Federal Tort Claims Act, which the Court implied in Feres v.



United States, 340 U.S. 135 (1950), binding on the construction of the "incident to service" exclusion contained in the Military Claims Act, 10 U.S.C. §§2733 et seq.?

2. Can the estate of a member of the United States Navy, struck and killed by the negligent driving of a military vehicle before he reported for duty, be deprived of administrative compensation under the Military Claims Act simply because the accident occurred on a military base?

## STATUTORY PROVISIONS INVOLVED

United States Code, Title 10

§2733. Property loss; personal injury or death: incident to noncombat activities of Department of Army, Navy or Air Force

(a) Under such regulations as the Secretary concerned may prescribe, he, or, subject to appeal to him, the Judge Advocate General of an armed force under his jurisdiction, or the chief legal officer of the Coast Guard, as appropriate, if designated by him, may settle, and pay in an amount not more than $25,000, a claim against the United States for --

* * * *

(3) personal injury or death;

either caused by a civilian officer or employee of that department, or the Coast Guard, or a member of

the Army, Navy, Air Force, Marine Corps, or Coast Guard, as the case may be, acting within the scope of his employment, or otherwise incident to noncombat activities of that department, or the Coast Guard.

(b) A claim may be allowed under subsection (a) only if --

(1) It is presented in writing within two years after it accrues,....

(2) it is not covered by section 2734 of this title or section 2672 of title 28;

(3) it is not for personal injury or death of such member or civilian officer or employee whose injury or death is incident to his service;

(4) ...the personal injury or death, was not caused wholly or partly by a negligent or wrongful act of the claimant, his agent, or his employee;...

(5) it is substantiated as prescribed in regulations of the Secretary concerned.

* * * *

(c) Payment may not be made under this section for reimbursement for medical, hospital, or burial services furnished at the expense of the United States.

(d) If the Secretary concerned considers that a claim in excess of $25,000 is meritorious and would otherwise be covered by this section, he may pay the claimant $25,000 and report the excess to Congress for its consideration.

[Subsections (e), (f), (g) and (h) omitted]



Code of Federal Regulations, Title 32

§750.52 Statutory authority

(a) General authorization. Subject to the statutory exceptions set forth in §750.55(d), the Secretary of the Navy -- or the Judge Advocate General, subject to appeal to the Secretary -- may settle and pay, in an amount not in excess of $25,000, a claim against the Navy for ... personal injury or death, either caused by military personnel or civilian employees of the Navy while acting within the scope of their employment or otherwise incident to noncombat activities of the Navy,....

(b) Authorization for payment of claims in excess of $25,000. If the Secretary of the Navy considers that a claim in excess of $25,000 is meritorious and would otherwise be covered by 10 U.S.C. 2733 and subsection (a) of this section, he may make a partial payment of $25,000 and refer the excess to the Office of Management and Budget for submission to Congress for its consideration (10 U.S.C.2733(d)).

* * * *

(d) No right to sue. The Military Claims Act authorizes the settlement and payment of certain claims but does not authorize any right to sue the United States. The United States has consented to be sued in tort under 28 U.S.C. 1346(b) only, and, by virtue of 10 U.S.C. 2733(b)(2). Federal tort claims are not payable under the Military Claims Act.

(e) Territorial limitations. There is no geographical limitation on the application of the Military Claims Act, but if a claim arising in a foreign country is cognizable under the Foreign Claims Act (10 U.S.C. 2734), the claim shall be processed under Part 753 of this chapter.

§750.55 Scope of Liability

(a) Caused by a member or employee. Subject to the exceptions of paragraph (d) of this section, the Navy shall be responsible under 10 U.S.C. 2733 in money damages ... for personal injury or death, which is caused by military personnel or civilian employees of the Navy while acting within the scope of their employment.

(b) Otherwise incident to noncombat activities. Subject to the exceptions of paragraph (d) of this section a claim for damage ... for personal injury or death, although not shown to have been caused by any particular act or omission of military personnel or civilian employees of the Navy while acting within the scope of their employment, is payable under the Military Claims Act if otherwise incident to noncombat activities of the Navy. Claims within this category are those arising out of authorized activities which are peculiarly military activities having little parallel in civilian pursuits, and out of situations in which the Government has historically assumed a broad liability, such as claims for damage or injury arising from, and which are the natural or probable results or incidents of: maneuvers and special exercises; practice firing of heavy guns; practice bombing; naval exhibitions; operations of missiles, aircraft, and antiaircraft equipment; sonic booms; use of barriage balloons; use of instrumentalities having latent mechanical defects not traceable to negligent acts or omissions; explosions of ammunition; movement of combat vehicles or other vehicles designed especially for military use; and the use and occupancy of real estate.

* * * *

[Section (c) omitted]

(d) Claims not payable. Notwithstanding paragraphs (a), (b), and (c) of this section, the following claims shall not be paid under 10 U.S.C. 2733:



(1) Any claim for damage, loss, destruction, injury, or death which was proximately caused, in whole or in part, by any negligence or wrongful act on the part of the claimant, his agent, or his employee, unless the law of the place where the act or omission complained of occurred would permit recovery from a private individual under like circumstances, and then only to the extent permitted by that law;

(2) Any claim for damage, loss, destruction, injury, or death resulting from action by the enemy, or resulting directly or indirectly from any act by armed forces engaged in combat;

(3) Any claim for reimbursement for medical or hospital services furnished at the expense of the United States or, in the case of burial, for such portion of the expense thereof as may be otherwise paid by the United States;

(4) Any claim of military personnel or civilian employees of the United States for damage to or loss, destruction, capture, or abandonment of personal property occurring incident to their service which claim is cognizable under the Military Personnel and Civilian Employees' Claims Act as amended (31 U.S.C. 240-243) and applicable regulations (Part 751 of this chapter).

[Subsections (5) through (13) omitted]

(14) Any claim for personal injury or death of military personnel or civilian employees of the Government if such injury or death occurs incident to their service; and

(15) Any claim for damage, injury or death caused by a member or employee of the Department of the Navy while acting within the scope of his employment and which is in all other respects within the cognizance of the Federal Tort Claims Act and Subpart B of this part.

## STATEMENT OF THE CASE

On July 27, 1977, a 19-year-old pedestrian, Parachute Rigger, Airman David R. Welch, USN, was struck by a U.S. Navy postal truck at approximately 7:10 a.m. on the premises of the U.S. naval facility in Sigonella, Italy, while he was walking to work. The truck careened across both lanes for no apparent reason and struck David who was walking in the opposite direction on the outer edge of the road. David never reported for duty that morning as he died in transit to the Naval Regional Medical Center in Naples, Italy. The driver of the truck was another sailor, whom subsequent investigation showed to have spent a sleepless and probably drunken night. He was found to have been at fault in causing the death of David Welch.

Clarence Welch, David's father and the Administrator of his estate, filed a claim for wrongful death with the Secretary of the



Navy. The Secretary found that "PRAN Welch's death on board the Naval Air Facility while he was walking to work was incident to his service" and that payment was therefore precluded by 10 U.S.C. §2733(b)(3).

Mr. Welch sought review of the Secretary's decision from the U.S. District Court for the District of Connecticut pursuant to 28 U.S.C. §§1331(a) and 1361. The Court granted the government's Motion to Dismiss, finding that the case was controlled by Camassar v. United States, 531 F.2d 1149 (2d Cir. 1976), a case involving the Federal Tort Claims Act, 28 U.S.C. §1346(b).

The Court of Appeals for the Second Circuit affirmed the decision below. It rejected Mr. Welch's argument that the "incident to service" exclusion under the Military Claims Act must be construed broadly because it provides an administrative remedy for persons injured by military activities.

Instead, it held that the Military Claims Act must be construed in the same way as the judicially created "incident to service" exception to the government's waiver of sovereign immunity under the Federal Tort Claims Act. The result, in this case, was to deprive the Estate of David Welch compensation for his death merely because that death occurred on a military base while he was a sailor, even though the injuries which caused his death did not occur in the course of his military duties and were unrelated to those duties.

## REASONS FOR GRANTING THE WRIT

### 1. THE DECISION BELOW, THE FIRST REPORTED CONSTRUCTION OF THE MILITARY CLAIMS ACT, STRIPS SERVICEMEN INJURED OUTSIDE THE SCOPE OF THEIR DUTIES OF ADMINISTRATIVE COMPENSATION TO WHICH THEY ARE ENTITLED BY LAW.

Judge Clarie's decision, now reported at 446 F.Supp. 75 and affirmed by the Second Circuit, is apparently a case of first



impression. In deciding it, both the District Court and the Court of Appeals treated as binding precedent the Second Circuit's decision in Camassar v. United States, supra. Camassar dealt with a suit against the government under the Federal Tort Claims Act for the death of an off-duty sailor whose vehicle rolled off a pier and sank, drowning him. The Court of Appeals held there that a serviceman on active duty who is killed or injured on the premises of a military installation is killed "incident to his service" and so is not entitled to take advantage of the government's waiver of sovereign immunity under the Federal Tort Claims Act.

But the Military Claims Act, 10 U.S.C. §§2731 et seq., which is at issue in this case, is not a waiver of sovereign immunity. The MCA creates an administrative remedy whereby the Secretary of Defense may settle a personal injury or death claim against the

United States. It does not authorize a claimant to sue the United States. 32 C.F.R. §750.52(d). Thus, conceptually it differs drastically from the Federal Tort Claims Act.

Applicable Navy regulations make payment of claims under the MCA mandatory unless they fall within one of several specific exclusions. 32 C.F.R. §750.55(a). The MCA provides:

> A claim may be allowed under subsection (a) only if --
>
> * * * *
>
> (3) it is not for personal injury or death of such a member or civilian officer or employee whose injury or death is incident to his service,.... 10 U.S.C. §2733(b)(3)

The regulations, at 32 C.F.R. §750.55(d)(14), also state:

> Notwithstanding paragraphs (a), (b) and (c) of this section, the following claims shall not be paid under 10 U.S.C. §2733:
>
> * * * *



> (14) Any claim for personal injury or death of military personnel or civilian employees of the Government if such injury or death occurs incident to their service....

The Navy is apparently construing these exclusions to deny recovery to any active duty serviceman injured on the premises of any military facility, regardless of whether the injury was related in any meaningful way to the serviceman's military duties. Such a construction is not warranted by the language of the Military Claims Act and has only developed under the Federal Tort Claims Act for reasons peculiar to the FTCA.

An "incident to service" exception to the government's waiver of sovereign immunity was implied by this Court in Feres v. United States, 340 U.S. 135 (1950), an action by a soldier's executrix for negligence in quartering the soldier in an unsafe barracks which burned down. Companion cases were both medical malpractice actions against military surgeons.

In support of its holding that the FTCA did not waive sovereign immunity for injuries suffered by servicemen incident to their service, the Court mentioned several policy considerations. First, the Court found that the FTCA was passed to relieve Congress of dealing with tort claims through private bills and that "Congress was suffering from no plague of private bills on the behalf of military and naval personnel because a comprehensive system of relief had been authorized for them and their dependents by statute." Feres, supra at 140. Second, it could conceive of no "like circumstances" in which a private individual would be liable, owing to the government's exclusive power to conscript or mobilize an army, and foresaw difficulties in applying varying state laws to a relationship so "distinctively federal" in character. Finally, the Court recognized the superiority of administrative compensation



systems over litigation for dealing with the special problems of servicemen.

None of these policy considerations operate to bar recovery under the Military Claims Act, which is an administrative remedy. The problems of litigation are absent; in this case, for example, the Secretary has an investigative report of the accident which establishes conclusively that the military driver was negligent and that the victim was an innocent pedestrian. Unlike the FTCA, the MCA does not require that the government be liable as a private individual in "like circumstances" or apply the law of the place where an accident or injury occurred. Instead it gives the Secretary discretion to pay claims against the United States, and the Navy has required payment by regulation, in 32 C.F.R. §750.55(a):

> [T]he Navy shall be responsible under 10 U.S.C. 2733 in money damages for damage to or loss or destruction of property, real or personal, or for

> personal injury or death, which is caused by military personnel or civilian employees of the Navy while acting within the scope of their employment.

It is true that there is little in the statutory history of the MCA to explain the scope of Congress' intent in excluding from the MCA coverage claims for personal injury or death incident to military service. But the District Court below made no attempt to consider that history or the policy considerations underlying the MCA. Because the District Court felt bound by the rule of Camassar, it could not give the MCA the kind of close scrutiny which the FTCA received in Feres and subsequently. Such scrutiny reveals persuasive reasons for interpreting the "incident to service" exclusion of the MCA much more narrowly than the Second Circuit did in Camassar. As the Supreme Court noted in Brooks v. United States, 337 U.S. 49, 52 (1949):

> Interpretations of the same words may vary, of course, with the consequences



> for those consequences may provide insight for determination of congressional purpose.

"Incident" has been defined as "occurring or likely to occur especially as a minor consequence of accompaniment" and as "dependent on or relating to another thing." Webster's Seventh New Collegiate Dictionary (1971). These definitions suggest that the phrase "incident to service" requires some causal connection between the injury for which recovery is sought and military service.

This Court found the absence of such a causal connection significant in the Brooks case, supra. In Brooks, a soldier on leave injured off-base was permitted to sue the government under the Federal Tort Claims Act. In Feres, this Court distinguished the barracks situation from Brooks by observing:

> Brooks' relationship while on leave was not analogous to that of a soldier injured while performing duties under orders. 340 U.S. 135, 140.

And in Brooks, the Court pointed out:

> But here we are dealing with an accident which had nothing to do with the Brooks' army careers, injuries not caused by their service except in the sense that all human events depend on what has already transpired. 337 U.S. 49, 52.

Subsequent litigation has narrowed the circumstances under which military personnel may sue the government in tort, particularly in the Second Circuit. See Camassar v. United States, supra. But that litigation has never faced the different issues implicit in the distinction between a tort suit and administrative compensation.

Even in Feres, the Court clearly contemplated some causal connection between the injury and military status. No such causal connection exists under the circumstances presented by this case -- and indeed the presence or absence of such a connection became irrelevant once Camassar was applied.

David Welch was not the "soldier injured while performing duties under orders" to whom this Court alluded in Feres. 340 U.S.



at 140. He was a pedestrian who had not reported to work. He was under no military compulsion to be at the side of the road where he was struck, and he had no military relationship with the driver of the vehicle. He could just as easily have been a civilian employee or a sailor's dependent. All sailors on active duty are not on duty. The test facing servicemen who claim compensation under the Military Claims Act ought to be not whether the accident happened on base but whether the accident was a consequence of or dependent on their military service.

The consequence of reading back into the Military Claims Act the narrow construction of similar language in the FTCA subsequent to Feres will be to cut off from administrative redress all off-duty military personnel injured on military bases in whatever circumstances. This Court had no such intent in Feres nor did the Second Circuit in

Camassar. There is certainly no indication that Congress intended such a result when it passed the Military Claims Act.

2. THE DECISION BELOW UNDERMINES THE ADMINISTRATIVE COMPENSATION SCHEME ESTABLISHED BY CONGRESS AND MAKES RECOVERY UNDER THE MILITARY CLAIMS ACT DEPENDENT ON DIFFERENT STANDARDS IN THE VARIOUS CIRCUITS.

The Military Claims Act was intended to provide for expeditious administrative settlement of claims for property damages, personal injuries or death caused by military personnel or civilian employees of the military acting within the scope of their employment or otherwise incident to noncombatant military operations. Its scope is worldwide and it applies to the public generally. See, S. Rep. No. 2216, 85th Cong. 2d Sess. (August 6, 1958), reprinted in 1958 U.S. Code Cong. & Ad. News 3784.

The MCA does not exclude servicemen from its coverage. It does not exclude injuries occurring on military premises. Instead, it



excludes only claims of a member of the military "whose injury or death is incident to his service." 10 U.S.C. §2733(b)(3).

The standards for determining the government's liability under the MCA are contained in the statute and its implementing regulations. Unlike the Federal Tort Claims Act, 28 U.S.C. §1346(b), liability under the MCA is not governed by the law of the place where the injury occurred. Persons injured by the activities of military personnel are thus equally entitled to compensation under similar circumstances.

This expeditious administrative compensation scheme contrasts starkly with the uncertainties of suing the United States under the Federal Tort Claims Act. For example, a serviceman attempting to sue the government must meet shifting and widely differing standards of liability, depending on the district in which suit is brought. In California, recovery depends on whether or not

the servicemen's injuries stemmed from activities that involved an official military relationship between the negligent person and the claimant. Lee v. United States, 261 F. Supp. 252, 256 (C.D. Cal. 1966).

In the Sixth Circuit, the proper standard is whether the injuries "arose out of or in the course of military duty." Hale v. United States, 416 F.2d 355 (6th Cir. 1969). Cf Camassar v. United States, supra.

The decision below, by holding that interpretations of the "incident to service" exception to the FTCA are controlling on the meaning of the "incident to service" exclusion under the MCA, incorporates wholesale into the latter statute the confusing and conflicting interpretations of that phrase which have grown up in the wake of Feres. See Hale v. United States, supra. What is the Secretary of Defense to do when faced with a claim under the MCA? Shall he



apply the law of the circuit in which the injury occurred? Shall he choose whichever interpretation appeals to him? And if his interpretation is appealed, will the claimant's rights depend on considerations more relevant to a waiver of sovereign immunity than to an administrative compensation scheme? None of this uncertainty could have been intended by Congress when it attempted to provide for expeditious settlement of such claims, and such a result would be unnecessary if this Court ordered that the Military Claims Act be construed uniformly and independently of the case law under the Federal Tort Claims Act.

### 3. THE DECISION BELOW MISCONSTRUES THE RATIONALE OF FERES AND ITS PROGENY

In deciding Feres, this Court relied heavily on the existence of an administrative compensation scheme for servicemen, 340 U.S. at 144-145. The issue in Feres was not whether the serviceman was killed

incident to his service. Recently, this Court has summarized its Feres holding as follows:

> [A]n on-duty serviceman who is injured due to the negligence of Government officials may not recover against the United States under the Federal Tort Claims Act. Stencel Aero Eng. Corp. v. United States, 431 U.S. 666, 45 U.S. L.W. 4598, 4599 (1977). Emphasis added.

The correctness of the Second Circuit's decision in Camassar, which extends the government's immunity under Feres to off-duty servicemen who are injured on military premises is not at issue here. But the application of that arguably incorrect decision in a completely different statutory context, which provides compensation for servicemen not killed incident to their service, ought to be reviewed by this Court. For the Federal Tort Claims Act, as a waiver of sovereign immunity, must be read restrictively. But the Military Claims Act is a statutory entitlement which confers



broad powers on the government to settle claims, and should be read in light of Congress' preference for administrative over judicial remedies. Such a reading would construe the exclusion restrictively. Such a construction is unlikely to equate the phrase "incident to his service" with "on active duty", a status in which the Second Circuit has said military or naval personnel continue "even when they are on liberty or on leave." Camassar v. United States, 531 F.2d at 1151, Note 2.

In its insistence on applying Camassar to this case, the Second Circuit failed to give the issues here the rigorous scrutiny and analysis that this Court afforded the plaintiffs in both Brooks and Feres. The statutory history received only cursory attention, and the policy behind the MCA and the potential impact on service morale and compensation were not considered at all. Particularly in light of the change to a

volunteer military, these considerations demand scrutiny. A Writ of Certiorari is the only way to provide a complete and equitable disposition of these important legal questions.

## CONCLUSION

Because the rights of countless servicemen depend on this Court's review and because the decision below deprives those servicemen of administrative compensation to which they are entitled under the Military Claims Act, the Petitioner prays that a Writ of Certiorari issue to the Court of Appeals for the Second Circuit.

Respectfully submitted,

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## INDEX TO APPENDIX

Clarence WELCH, Administrator of the Estate of David R. Welch

v.

UNITED STATES of America.

Civ. No. H-77-347.

United States District Court, D. Connecticut.

Feb. 3, 1978.

Action was brought challenging decision by the Secretary of the Navy that claimant's decedent was killed "incident to his service" so as to bar recovery under the Military Claims Act. On motion of the United States to dismiss for lack of jurisdiction and for failure to state a claim on which relief could be granted, the District Court, Clarie, Chief Judge, held that: (1) it had jurisdiction to review question of law as to whether decedent was killed "incident to service," but (2) where decedent was a member of the Navy who was on active duty and whose injury occurred on a military base, his death occurred "incident to his service" and claim under the Act was barred.

Motion granted.

1. Administrative Law and Procedure (KEY) 663
   Declaratory Judgment (KEY) 272

Neither the Administrative Procedure Act nor the Declaratory Judgment Act conferred subject matter jurisdiction on federal district court. 5 U.S.C.A. § 702; 28 U.S.C.A. § 2201.

2. Administrative Law and Procedure
(KEY) 553

Amendment of federal question jurisdictional statute to eliminate specified amount in controversy requirement was intended to make judicial review widely available to challenge actions of federal administrative officials, but district court cannot review determination which Congress has expressly or impliedly shielded from judicial review. 28 U.S.C.A. § 1331(a).

3. United States (KEY) 78(16)

Despite provision in the Military Claims Act that settlement of a claim thereunder is "final and conclusive," judicial review was not precluded with respect to question of law, as to whether claimant's decedent was killed "incident to service" within exclusionary provision of the Act. 10 U.S.C.A. §§ 2731 et seq., 2733(b)(3), 2735.

4. United States (KEY) 78(16)

Where decedent was a member of the Navy who was on active duty and whose injury incurred on military base, his death when he was struck by a navy vehicle while walking to work occurred "incident to service" so that claim under the Military Claims Act was barred. 10 U.S.C.A. § 2733(b)(3).

See publication Words and Phrases for other judicial construction and definitions.



RULING ON MOTION TO DISMISS

CLARIE, Chief Judge.

This case is before the Court on the defendant's motion to dismiss for lack of jurisdiction and for failure to state a claim upon which relief can be granted. The controversy arises out of a motor vehicle accident on the premises of the United States Naval Air Facility in Sigonella, Italy, which resulted in the death of a sailor, David R. Welch, after he was struck by a United States Naval vehicle. The plaintiff-administrator of the decedent's estate is aggrieved by the decision of the Secretary of the Navy that David R. Welch was killed "incident to his service", thus barring recovery under the Military Claims Act (MCA), 10 U.S.C. § 2731, et seq. The Court finds that it has jurisdiction to review the question of law as to whether the decedent was killed "incident to service". However, the plaintiff is not entitled to an order compelling the defendant to process his claim under the MCA, because the Secretary of the Navy has accurately applied the controlling law of this circuit, as set forth in Camassar v. United States, 531 F.2d 1149 (2d Cir. 1976), in concluding that the decedent died "incident to service."

FACTS

The plaintiff is the administrator of the Estate of David R. Welch. On July 27, 1976, the decedent was serving on active duty with the United States Navy stationed at the United States Naval Air Facility in Sigonella, Italy. While walking to work on the Naval Air Facility that morning, at approximately 6:50 a.m., Welch was struck by a United States Naval vehicle, which was negligently driven by a member of the United States Navy. As a result of the accident,

Welch died while being transported to the Naval Regional Medical Center in Naples, Italy. The defendant in the action is the Secretary of the Navy.

Discussion of the Law

The initial barrier to any suit for damages against the United States is the doctrine of sovereign immunity. Congress removed this barrier for litigants alleging wrongs committed by the Government, which were covered by the Federal Torts Claims Act of 1946, 28 U.S.C. §1346(b). The existence of the Federal Torts Claims Act is of no help to the plaintiff in this instance, however, because the statute specifically excludes his claim. The tortious conduct of which the plaintiff complains occurred in Italy, and 28 U.S.C. §2680(k) states that the Act shall not apply to "[a]ny claim arising in a foreign country."

Since the remedy afforded by the Federal Torts Claims Act is unavailable to him, the plaintiff looks to the Military Claims Act, 10 U.S.C. § 2731, et seq., for relief. The Military Claims Act does not enable private litigants to bring suit against the federal government, as does the Federal Torts Claims Act. Rather, the MCA gives authority to the Secretaries of the Army, Navy, and Air Force to settle claims amounting to less than $25,000 against the United States for personal injury or death, inter alia. Pursuant to the authority delegated to him by the MCA, the Secretary of the Navy has promulgated regulations which prescribe under what circumstances these military claims will be settled. 32 C.F.R. § 750.55(a), states, that subject to certain exceptions:



> "[T]he Navy shall be responsible under 10 U.S.C. 2733 in money damages for damage to or loss or destruction of property, real or personal, or for personal injury or death, which is caused by military personnel or civilian employees of the Navy while acting within the scope of their employment."

The United States does not contest the assertion that the case of the plaintiff falls within the inclusive language of this part of the regulation. The Government contends, however, that both the MCA[1/] and the Navy regulations promulgated pursuant thereto[2/] exclude the plaintiff's claim from the scope of the

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1/ 10 U.S.C. § 2733(b) states that a claim may be allowed under the MCA only if:

> "(3) it is not for personal injury or death of [a military] employee whose injury or death is incident to his service."

2/ 32 C.F.R. § 750.55(d)(14) bars:

> "Any claim for personal injury or death of military personnel or civilian employees of the Government if such injury or death occurs incident to their service . . . ."

Government's liability, in that the claim involves the death of a member of the Navy who was killed "incident to his service." In view of this "Incident to service" exception, the Secretary of the Navy denied the plaintiff's administrative claim brought pursuant to the MCA. The plaintiff in the instant litigation seeks a judicial determination that his case does not fall within the "incident to service" exclusion and that therefore he is entitled to have his claim processed fully under the MCA.

Jurisdiction

[1,2] The plaintiff asserts that jurisdiction over the instant controversy is conferred on this Court by 28 U.S.C. § 1331(a).[3/] Congress recently amended this section:

> "to eliminate the requirement of a specified amount-in-controversy as a prerequisite to the maintenance of 'any [1331] action brought against the United States,

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3/ The plaintiff also argues that the Court has jurisdiction over the case pursuant to 5 U.S.C. § 702 (of the Administrative Procedure Act) and 28 U.S.C. § 2201 (allowing declaratory relief). It is now established that neither of these sections confers subject-matter jurisdiction on the federal courts. See, Califano v. Sanders, 430 U.S. 99, 97 S.Ct. 980, 51 L.Ed.2d 192 (1977) (holding that the Administrative Procedure Act "does not afford an implied grant of subject-matter jurisdiction . . . ."); Lear Siegler, Inc. v. Adkins, 330 F.2d 595 (9th Cir. 1964) (holding that § 2201 does not establish a basis for jurisdiction in the federal courts).



> any agency thereof, or any officer or employee thereof in his official capacity.' The obvious effect of this modification, subject only to preclusion-of-review statutes created or retained by Congress, is to confer jurisdiction on federal courts to review agency action . . . ." Califano v. Sanders, 430 U.S. 99, 105, 97 S.Ct. 980, 984, 51 L.Ed.2d 192 (1977) (emphasis supplied).

While the amendment of § 1331(a) "undoubtedly evinces Congress' intention and understanding that judicial review should be widely available to challenge the actions of federal administrative officials," Califano, supra, at 104, 97 S.Ct. at 983; 1976 U.S.Code Cong. and Admin. News, at p. 6125, this Court is without power to review the decision of the Secretary of the Navy not to pay damages on a claim made pursuant to the MCA, if Congress has expressly or impliedly shielded this determination from judicial review. 1976 U.S. Code Cong. and Admin. News, at p. 6132.

Justice Harlan, writing for the Supreme Court in Abbott Laboratories v. Gardner, 387 U.S. 136, 87 S.Ct. 1507, 18 L.Ed.2d 681 (1967), indicated that there is a presumption that final agency action shall be subject to judicial review. Abbott, supra, 387 U.S. at 140-141, 87 S.Ct. 1507. This presumption of reviewability:

> "can be overcome by showing (a) intent of Congress to cut off review, (b) inappropriateness of the subject matter for judicial consideration, or (c) some other reason that a court deems sufficient for unreviewability." Davis, Administrative Law of the Seventies (Supplementing Administrative Law Treatise) § 28.08, at 634-635 (1976).

Abbott indicated that courts should restrict access to judicial review on the grounds that Congress so intended, only where this legislative intent has been shown by "clear and convincing evidence." 387 U.S. at 141, 87 S. Ct. 1507.

[3] Congressional intent on the issue of reviewability is provided by the MCA itself. 10 U.S.C. § 2735 states that:

> "Notwithstanding any other provision of law, the settlement of a claim under [the MCA] is final and conclusive."[4/]

While this language appears to exclude judicial review, the Senate Report which discusses the purpose of this section states that Congress sought to prevent "other agencies of the Government from reviewing and reversing actions on claim settlements of agencies specifically

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4/ The statute also indicates that a decision by the Secretary to disallow a claim under the MCA has been "settled". Thus, 10 U.S.C. § 2731 states:

> "In this chapter, 'settle'means consider, ascertain, adjust, determine, and dispose of a claim, whether by full or partial allowance or by disallowance." (emphasis supplied).



authorized to settle and pay certain claims." 1972 U.S.Code Cong. and Admin.News, at pp. 3109-10. Thus, the legislative history suggests that the purpose of the "final and conclusive" language in § 2735 is to prevent federal executive agencies and officials, such as the Comptroller General of the United States, from reviewing and possibly rejecting the settlements of MCA claims. Under this view, Congress, in enacting § 2735, was not precluding judicial review of agency construction and application of law, but only making the settlements of MCA claims final with respect to administrative review.[5/]

This interpretation of the words "final and conclusive" receives support from the Supreme Court's decision in Shaughnessy v. Pedreiro, 349 U.S. 48, 75 S.Ct. 591, 99 L.Ed. 868 (1955). In that case the plaintiff, an alien, was ordered deported under the Immigration and Nationality Act of 1952. The Act specified that deportation orders of the Attorney General shall be "final." When the plaintiff sought to have a federal court review the

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5/ There is an isolated comment in the legislative history which suggests an alternative interpretation of § 2735. See, Letter from Assistant Secretary of the Interior to Senator James Eastland, 1964 U.S.Code Cong. and Admin.News, at pp. 3414-15. However, the Court finds the later statements quoted above from the Senate Report to be more authoritative on the issue of legislative intent. First, the official Senate Report is entitled to greater weight than a mere letter to the Chairman of the relevant Senate committee. Second,

(footnote continued on following page)

deportation order and declare it to be void, the Government contended that the Act precluded judicial review of deportation orders by any method, except habeas corpus. The Supreme Court rejected this contention, stating:

> "It is more in harmony with the generous review provisions of the Administrative Procedure Act to construe the ambiguous word 'final' in the 1952 Immigration Act as referring to finality in administrative procedure rather than as cutting off the right of judicial review in whole or in part." Shaughnessy, supra, 349 U.S. at 51, 75 S.Ct. at 594.

The Supreme Court reached a similar conclusion in Harmon v. Brucker, 355 U.S. 579, 78 S.Ct. 433, 2 L.Ed.2d 503 (1958). In Harmon the Supreme Court reviewed the validity of a less-than-honorable discharge from the Army in spite of the relevant statute which made the order of the Army Discharge Review Board "final subject only to review by the Secretary of the Army." The Court concluded that where agency "inaction or action turns on a mistake of law, then judicial relief is often available." Panama Canal Co. v. Grace Line, Inc., 356 U.S. 309, 318, 78 S.Ct. 752, 757, 2 L.Ed.2d 788 (1958). The Second Circuit Court of Appeals has indicated that the rational behind this conclusion is "the funda-

(footnote continued from preceding page)
the language of the Senate Report more directly addresses the issue of the "purpose" of the legislation than does the passing remark in the above-mentioned letter.



mental principle that ours is a government of laws, not men." Hammond v. Lenfest, 398 F.2d 705 (2d Cir. 1968).

Since none of the factors which would overcome the presumption of reviewability of an agency's interpretation of the law is present in this case, the Court concludes that it has jurisdiction over the plaintiff's claim under 28 U.S.C. §§ 1331(a) and 1361.

The "Incident to Service" Exclusion

[4] The accident out of which the present controversy arises occurred on the premises of the Naval Air Facility in Sigonella, Italy. The decedent was considered to be on active duty[6/] despite the fact that he had not yet reported to work on the day of the accident, for it is established that:

> "Military or naval personnel continue in active duty status even where they are on liberty or on leave which are attributes of active duty . . . ." Camassar v. United States, 531 F.2d 1149, 1151 n. 2 (2d Cir. 1976).

The Secretary of the Navy declared that the decedent was killed "incident to his service", and therefore his claim was barred by 10 U.S.C. § 2733(b)(3).

While no case appears to have interpreted the "incident to service" exclusion of the MCA,

6/ The plaintiff concedes in the complaint that the decedent was on active duty at the time of the accident.

there is an established body of law to which the Court can turn for guidance. In Feres v. United States, 340 U.S. 135, 71 S.Ct. 153, 95 L.Ed. 152 (1950), the Supreme Court created an exception to coverage of the Federal Torts Claims Act, 28 U.S.C. § 1346(b). The Court noted that the then extant Military Personnel Claims Act specifically excluded claims of military personnel "incident to their service," Feres, 340 U.S. at 144, 71 S.Ct. 153, and then proceeded to apply a similar exception to the Federal Torts Claims Act. Since the current MCA retains the "incident to service" exclusion, the case law interpreting the judicially-created Feres exception should be considered authoritative on the interpretation of the statutory language in question.

The Second Circuit Court of Appeals has distilled the general rule of law from the progeny of Feres as follows:

> "[A]n injury to a member of the armed forces, on active duty, which occurs at a military base or installation . . . is an injury 'aris[ing] out of or [is] in the course of activity incident to [military] service.'" Camassar v. United States, 531 F.2d 1149, 1151 (1976), affirming 400 F.Supp. 894 (D. Conn. 1975) (footnote omitted).

In the instant case, the decedent was a member of the Navy who was on active duty and whose injury occurred on a military base. The conclusion is inescapable, given Camassar, that the decedent's death occurred "incident to his service." Consequently, the Secretary of the Navy did not err when he determined that the claim involved in this case was barred by 10 U.S.C. § 2733(b)(3).

Accordingly, the defendant's motion to dismiss is granted. SO ORDERED.



UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

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| CLARENCE WELCH, Administrator of the Estate of David R. Welch | : | C O P Y |
| | : CIVIL ACTION | |
| v. | : NO. H-77-347 | |
| | : | |
| UNITED STATES OF AMERICA | : | |

JUDGMENT

The above-entitled action came on for consideration by the Court by the Honorable T. Emmet Clarie, Chief United States District Judge, of the Defendant's Motion to Dismiss; and,

The Court, after a hearing on the Defendant's Motion and consideration of all papers submitted in connection therewith, filed its Ruling thereon granting the Defendant's Motion;

It is therefore accordingly ORDERED and ADJUDGED that the Plaintiff's Complaint be and is hereby dismissed.

Dated at Hartford, Connecticut, this 10th day of February, 1978.

SYLVESTER A. MARKOWSKI
Clerk, United States
District Court

By William D. Templeton /s
Deputy-in-Charge

(Filed: Feb. 10, 1978)

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New Haven, on the 20th day of June one thousand nine hundred and seventy-eight.

Present:

IRVING R. KAUFMAN,
Chief Judge

WILLIAM H. TIMBERS,

THOMAS J. MESKILL,

Circuit Judges,

CLARENCE WELCH,

Appellant,

v. 78-6082

UNITED STATES,

Appellee.

Appeal from the United States District Court for the District of Connecticut.

This cause came on to be heard on the transcript of record from the United States District Court for the District of Connecticut, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the



judgment of said District Court be and it hereby is affirmed.

1. Since appellant's son, David Welch, was killed on a military base while a member of the armed forces on active duty, appellant is barred from recovery under the Military Claims Act by the "incident to service" exception, 10 U.S.C. §2273(a)(3). See Camassar v. United States, 531 F.2d 1149 (2d Cir. 1976)(per curiam), construing an identical exception implied under the Federal Tort Claims Act in Feres v. United States, 340 U.S. 135 (1950).

2. We reject appellant's argument that the exception to the Military Claims Act should be construed more narrowly than its counterpart in the Federal Tort Claims Act. The Court in Feres, supra, explicitly held that no federal statute, including the predecessor to the Military Claims Act, recognizes a right to recovery in circumstances similar to those here presented. Moreover, the Military Claims Act is clearly intended solely to compensate members of the public for injuries sustained as a result of noncombatant military operations. See S. Rep. No. 2216, 85th Cong., 2d Sess. (Aug. 8, 1958), reprinted in 1958 U.S. Code Cong. & Adm. News, 3784-85.

Irving R. Kaufman /s
IRVING R. KAUFMAN
Chief Judge.

Filed: June 20, 1978

Wm H. Timbers /s
WILLIAM H. TIMBERS,

Thomas J. Meskill /s
THOMAS J. MESKILL,
Circuit Judges.

No. 78-714

# In the Supreme Court of the United States

OCTOBER TERM, 1978

CLARENCE WELCH, ADMINISTRATOR OF THE ESTATE OF DAVID R. WELCH, PETITIONER

*v.*

W. GRAHAM CLAYTOR, JR., SECRETARY OF THE NAVY

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

## MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

WADE H. McCREE, JR.
*Solicitor General*
*Department of Justice*
*Washington, D.C. 20530*

# In the Supreme Court of the United States

OCTOBER TERM, 1978

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CLARENCE WELCH, ADMINISTRATOR OF THE ESTATE OF DAVID R. WELCH, PETITIONER

*v.*

W. GRAHAM CLAYTOR, JR., SECRETARY OF THE NAVY

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

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## MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

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Petitioner's decedent, a sailor stationed in Italy on active duty with the Navy, was fatally injured by a naval vehicle driven by a member of the Navy. The accident occured on the naval air facility base while decedent was walking to work (Pet. App. 3).

Petitioner's claim for damages for wrongful death was denied by the Secretary of the Navy, who found that the fatal accident was "incident to service" and that recovery was barred by Section 2733(b)(3) of the Military Claims Act (MCA), 10 U.S.C. 2731 *et seq.*[1] The Secretary also

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[1]The MCA authorizes the Secretary of the Navy to settle certain claims for property loss, injury, and death resulting from non-combatant military operations. Section 2733(b)(3) of the Act excludes claims for personal injury or death of a member of the military "whose injury or death is incident to his service."

concluded that petitioner's claim under the Federal Tort Claims Act (FTCA) was barred by the "foreign country" exception, 28 U.S.C. 2680(k), and by the "incident to service" exception defined in *Feres* v. *United States*, 340 U.S. 135 (1950).

The district court upheld the Secretary's determination, concluding that neither Act provides a remedy for petitioner. The court pointed out that the FTCA is inapplicable because petitioner's claim arose in a "foreign country" (Pet. App. 4) and that the MCA is inapplicable because the injury was "incident to service" (Pet. App. 11-12). In interpreting the MCA's "incident to service" exception, the court followed *Feres* and its progeny, including *Camassar* v. *United States*, 400 F. Supp. 894 (D.Conn. 1975), affirmed, 531 F. 2d 1149 (2d Cir. 1976), which establish that an injury to a member of the armed forces on active duty, which occurs on a military base, is an injury incident to military service. The court of appeals affirmed (Pet. App. 14-15).

Petitioner contends that the dismissal of his claim under the MCA was improper. Although there is no material difference between the MCA and FTCA "incident to service" exceptions,[2] petitioner contends that the court below erred in relying on *Feres* and its progeny in construing the MCA because different policies underlie the two Acts. He contends that the MCA creates a broad administrative remedy for persons injured by military activities and therefore the "incident to service" exception in the MCA should be construed more narrowly than its counterpart in the FTCA (Pet. 11-12, 24-25).

[2]The MCA excludes claims of a member of the military whose injury or death is incident to his service, while, under *Feres*, *supra*, 340 U.S. at 146, the FTCA excludes claims that "arise out of or are in the course of activity incident to service."



But the purpose of Congress in enacting the MCA was to compensate members of the public for injuries caused by military operations, not members of the military for service connected injuries. See S. Rep. No. 2216, 85th Cong., 2d Sess. 1-6 (1958). Thus, the lower court's interpretation of the "incident to service" exception to exclude decedent's claim is entirely consistent with the policies of the Act.

This Court's decision in *Feres* provides direct support for the decision here. In *Feres*, which involved an active-duty serviceman injured on base by the negligence of other servicemen, this Court pointed out that "[n]o federal law recognizes a recovery such as claimants seek. The Military Personnel Claims Act, 31 U.S.C. §223b * * * permitted recovery in some circumstances, but it specifically excluded claims of military personnel 'incident to their service' " (340 U.S. at 144). The claim in *Feres*, substantially similar to petitioner's claim, was thus recognized as being incident to the decedent's service within the meaning of the Military Personnel Claims Act, the precursor of the current statute.[3]

Even assuming *arguendo* that the courts below erred in relying on decisions construing the FTCA, we submit that decedent's death was "incident" to his service under any reasonable interpretation of the MCA exception. At the time of the accident, decedent was on active duty. His presence at the naval air facility was pursuant to military assignment and he was reporting for morning duty subject to specific military orders. Reporting for duty on the military base was clearly incident to his service obligations. Cf. *O'Keeffe* v. *Smith, Hinchman & Grylls Associates*, 380 U.S. 359 (1965). Because military service

[3]The sole issue in *Feres* was whether the FTCA excludes injuries incident to service (340 U.S. at 138). This Court's recent decision in *Stencel Aero Engineering Corp.* v. *United States*, 431 U.S. 666, 670-674 (1977), reaffirms the *Feres* principle.

had more than a remote or fortuitous connection with the accident, *Brooks* v. *United States*, 337 U.S. 49 (1949), is inapposite. The serviceman in *Brooks* was injured in a private vehicle while on leave, far from the military installation, and in pursuit of personal activities. The decedent in this case, in contrast, was injured by a military vehicle on base while he was attemping to discharge his service obligations.

As the Court pointed out in *Stencel Aero Engineering Corp.* v. *United States*, 431 U.S. 666, 671, 673 (1977), the Veterans' Benefits Act, 38 U.S.C. 321 *et seq.*, establishes a statutory "no fault" compensation scheme that provides benefits for the surviving spouse, children and parents of servicemen killed in active military service without proof of negligence by the government.[4] Congress provided death benefits for members of the military killed in service connected accidents under that statute, not the Military Claims Act. There is thus a specifically prescribed remedy for the estate in this case and no warrant for expanding the MCA beyond the legislative intent.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
*Solicitor General*

DECEMBER 1978

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[4]Additional death benefits are prescribed under 10 U.S.C. 1475 *et seq.*

DOJ-1978-12